

ADAM WANG, Bar No. 210233
LAW OFFICES OF ADAM WANG
12 South First Street, Suite 613
San Jose, CA 95113
Tel: (408) 292-1040
Fax: (408) 286-6619
waqw@sbcglobal.net

TOMAS E. MARGAIN, Bar No. 193555
LAW OFFICES OF TOMAS E. MARGAIN
1550 Bryant Street, Suite 725
San Francisco, CA 94103
Telephone: 415-861-9600
Fax: 415-861-9622
margainlaw@hotmail.com

Attorney for Plaintiffs
Vladimir Balarezo & Osmín Avila

UNITED STATES DISTRICT COURT
FOR DISTRICT OF NORTHERN CALIFORNIA

VLADIMIR BALAREZO, ABELARDO
GUERRERO, VICTOR FUNEZ & OSMIN
AVILA, and on behalf of other similarly
situated

Plaintiffs,
vs.

NTH CONNECT TELECOM INC., AND
STEVEN CHEN,

Defendants

Case No.:C07-05243 JF (PVT)

**PLAINTIFFS' REPLY BRIEF IN SUPPORT
OF MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Date: July 1, 2008
Time: 10:00 am
Judge: Patricia V. Trumbull

I. INTRODUCTION

In their opposition, Defendant essentially concede that all the document requests at issue in this motion are relevant to establishing Plaintiffs' claims. Defendants' objections hinge on the following grounds:

1. The document requests concerning employees who have not opted-in are premature and irrelevant at this stage of the case;

2. The wage and hour documents are protected by a right of privacy;

1 3. Production would be overbroad and over-burdensome;

2 4. The effect of Plaintiff requests for documents was somehow reduced because the
3 request was served before the Court granted Plaintiffs' motion to conditionally certify an opt-in
4 FLSA class.

5 None of these objections have merit. In a class action seeking unpaid overtime and other
6 wages, documents relating to the other putative members' hours and wages are relevant to issues
7 of numerosity, commonality, typicality and adequate representation necessary to certify a class.
8 As such, a request for production of such documents is not premature and irrelevant at the pre-
9 certification stage. Hill v. Eddie Bauer, 242 F.R.D. 556 (C.D. Cal. 2007).

10 Defendants' concern for their employee's right to privacy, while recognized by FED. R.
11 EVD. 501 in federal case based on diversity jurisdiction, is not recognized in an action based on
12 federal question jurisdiction. see Corser v. County of Merced, 2006 WL 2536622 (E.D. Cal.
13 2006); see also, Hill, at 242 F.R.D. 562. To begin, it is doubtful that any of the information
14 sought infringes on a right to privacy as only time and pay information is being sought.
15 However, even recognizing a limited privilege under state law, this privilege is subject to
16 "balancing the needs of the litigation with the sensitivity of the information/records sought." Id.,
17 at 563. Here, Plaintiffs need these documents to pursue the class action certification, as well as
18 to prosecute this case, which will result in an economic benefit to these workers if successful.
19 Therefore, Plaintiffs are entitled to these documents.

20 Although Defendants assert the objection on the ground that the documents sought are
21 overbroad and burdensome to the Defendants, they have failed to introduce any evidence to
22 show undue burden. Perhaps had Defendants not stonewalled discovery and made boiler plate
23 objections, there may have developed some factual basis for some of these documents to justify
24 this objection.

25 The only category of documents Defendants have specifically addressed are the Comcast
Orders. However, as will be explained below, Plaintiffs believe, and Defendants also
acknowledge, that Defendants have in their possession other documents that are compiled based

on the preliminary Comcast Orders. Therefore, this shows that both the Comcast work orders at some point were compiled into one group of documents and that they can be located, copied, and produced. Moreover, it also appears that so long as the Comcast work Orders are not destroyed, there exist documents which Defendants compiled based on the raw data of the work orders and serve as a summary. Plaintiffs are willing to accept these compilation documents and review them so long as (1) the Work Orders cannot be easily copied when needed, and/or (2) Plaintiffs can verify that Defendants have not altered.

Again, if Defendants can establish some sort of burden as to the work orders, Plaintiffs will accept the compilation documents so long as they can then request Comcast Orders as to some specific weeks to spot check these compilations for accuracy. Plaintiffs suggest that the compilation documents be produced and for Plaintiffs to then be able to request Work Orders for five (5) specific weeks to spot check the compilations.

Finally, Defendants' refusal to produce documents based on the timing of the service of the document request is a vivid illustration of Defendants' habitual tactics of delaying and stalling this litigation. The document request was made and served because Plaintiffs filed and intend to pursue a class action for Defendants class wide wage and hour violations. Defendants have an obligation to comply with the document requests, regardless the fact that Plaintiffs served the request before they prevail on their motion to certify the FLSA.

II. ARGUMENTS

A. REQUEST FOR WAGE AND HOUR DOCUMENTS RELATING TO EMPLOYEES OTHER THAN PLAINTIFFS IS NOT PREMATURE BECAUSE THESE DOCUMENTS ARE RELEVANT AT THE PRE-CERTIFICATION STAGE IN A WAGE AND HOUR CLASS ACTION

Defendants concede, as they must, that at this stage of litigation, Plaintiffs are entitled to documents that are relevant to the class certification issues. Despite this concession, Defendants take the position that Plaintiffs are not entitled to any documents relating to any employees who

are not named as a Plaintiff or has opted into the case.¹ Defendants' position is completely without merits and without any justification.

In Hill v. Eddie Bauer—a similar class action to recover unpaid overtime and other wages, the Central District for California held that in a wage and hour class action, documents relating employee other than Plaintiffs are relevant and should be produced at the pre-certification stage. The Hill Court wrote:

“In a recent opinion regarding class certification, the Ninth Circuit recognized that ‘[t]he party seeking [class] certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met.’ *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1224 (9th Cir. 2007). In showing that each of the four requirements of Rule 23(a) have been met, plaintiff must establish numerosity, commonality, typicality, and adequate representation. Certainly, the [wage and hour] document requests will assist plaintiff in showing numerosity. Similarly, since ‘[i]t is well established that commonality may be established . . . through the use of statistical analysis[,] *id.* at 1228 (citing *Caridad v. MetroNorth Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000) and *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980)), [wage and hour] document requests will also assist plaintiff in showing commonality. Thus, plaintiff's Category (3) document requests are not premature, and are not precluded...”

Hill v. Eddie Bauer, at 242 F.R.D. 562.

Accordingly, Plaintiffs' document request is not premature and Plaintiffs' motion should be granted.

B. EMPLOYEES' RIGHT TO PRIVACY UNDER CALIFORNIA LAW DOES NOT PRECLUDE THE PRODUCTION OF DOCUMENTS REQUESTED IN THIS CASE

Defendants cite FED. R. EVD. 501 for a proposition that third party's right to privacy under California law should be recognized in this case. However, FED. R. EVD. 501 only requires

¹ To further illustrate Defendants' foot dragging, they have so far refused to provide Plaintiffs' counsel with a list of workers with addresses to send them the Opt-in Notice after Judge Fogel's Order dated May 2, 2008. Ironically Defendants refuse to provide this information and take the position that they will only provide worker specific information as they opt in.

1 federal court to recognize state law privilege in diversity cases. In a case like here where the
 2 substantive rights are based on a federal statute, privilege afforded merely under state laws are
 3 not recognized. Corser v. County of Merced, 2006 WL 2536622.² See also Hill, at 242 F.R.D.
 4 562. Plaintiffs are not trying to be draconian or to infringe on the privacy rights of workers. The
 5 documents sought include work related production documents and some stray pay records where
 6 worker's social security information and perhaps wage garnishment information may be found.
 7 However, this information is not relevant to proving up the case and Plaintiffs counsel will
 8 safeguard this information just as they do with their own client files when they contain social
 9 security numbers and other such information which federal law prohibits from being published.

10 In any event, even if the Court were to recognize privacy rights under California law, such
 11 rights are not absolute and are subject to the "balancing the needs of the litigation with the
 12 sensitivity of the information/records sought." Id., at 563. As discussed above, because
 13 Plaintiffs need these documents to pursue the class action certification, as well as to prosecute
 14 this case, Plaintiffs are entitled to these documents. Id.

15 For the same reason, Defendants' argument that Plaintiff should follow the notice
 16 procedure prescribed under California Code of Civil Procedure § 1985.6 fails, as this state law
 17 privilege does not apply in this case. Corser v. County of Merced, 2006 WL 2536622.

18 **C. DEFENDANTS HAVE FAILED TO MAKE THE REQUISITE SHOWING THAT THE
 19 PRODUCTION OF DOCUMENTS REQUESTED WOULD BE UNDULY BURDENSOME**

20 The Court in Hill limited Plaintiff's document requests only after the Defendants in that
 21 case made the required convincing showing that due to the way the documents were stored to
 22 generate and produce the documents as requested would be burdensome. See Hill, at 242 F.R.D.
 23 563-64. Here, Defendants have obviated any attempt to make a similar showing.

24
 25 ² In light of Defendants' complaint that they do not have access to west law, Plaintiffs have
 attached a copy of the opinion to this brief.

1 In their Opposition, Defendants simply failed to make any efforts to show why and how
 2 the production of documents as requested by Plaintiffs would be unduly burdensome. Except
 3 with respect to Comcast Orders, Defendants did not explain how the documents requested are
 4 stored; and what would be entailed to generate the documents requested. In fact, Defendants did
 5 not even submit one competent declaration to meet their burden in order to successfully resist the
 6 requested production.

7 There is only one reason for Defendants' such failure—they cannot make the required
 8 showing. RFD No. 1 requests individual employees' time cards. Ordinarily, time cards of all
 9 employees are stored by time periods; or maintained and sorted per employee. Neither of these
 10 storage systems requires substantial time to gather the documents required. Another document
 11 called for by the RFP is a computer maintained records that tracked the time each installer
 12 arrived at the customer's house and the time he finished the job. This document with respect to
 13 installers can be easily complied and produced by mere key strokes in the computer system.
 14 Oddly, rather than produce such documents, Defendants choose to go through 50 banker boxes at
 15 the costs of spending 50 man-hours³ to pull the physical Comcast Orders with respect to Plaintiff
 16 Vladimir Balarezo, because the information contained in that electronically maintained system
 17 could also be found in the 50 boxes of the documents. See Letter from Ms. Dana Butler, at
 18 Exh.1 to Wang Supp Decl.

19 RFP No. 2 calls for "By-Weekly Pay Out Sheet" and payroll records for all employees.
 20 Based on the testimony solicited in another separate case against the same Defendants, these
 21 documents are all electronically stored and contained in a series of Excel spreadsheets. See
 22 Wang Supp. Decl., at ¶ 3. No burden at all would be anticipated in generating and producing
 23 these documents. Furthermore, since April 2006, Defendants started using an outside payroll
 24 processor to process employees' payroll. Every pay period, Defendants would receive
 25 documents entitled "Payroll Register" of all employees from the payroll processor, and sell

³ See Opposition, at p. 8, Ins 7-9.

1 Payroll Registers with respect to all employees would be stored in a central location in binders.
2 There should be no burden at all in locating and producing these documents. See Wang Decl., at
3 ¶ 3.

4 REP No. 3 calls for the documents entitled Daily Count Sheet which record the number of
5 connects and disconnects each installer performed each work day. Admittedly, these documents
6 are voluminous, but they are presumably stored and sorted by each employee per pay period, and
7 should be easily gathered and produced. No evidence submitted suggests otherwise.

8 RFP No. 6 calls for employees manuals and policies that were in place during the
9 complaint period in this case. Plaintiffs do not understand why Defendants even objected to this
10 request, and trust that everyone would agree that no undue burden should be caused by such
11 request.

12 RFP No. 7 calls for the installation schedules Comcast made with the customers. This
13 request may be complied by producing the computer maintained installation time log with
14 respect to each and every installer. No burden at all should be caused by this request.

15 RFP No. 8 calls for documents concerning charges back against Defendants by Comcast
16 for installer's failure to keep the installation schedules. While in their Opposition, Defendants
17 failed to discuss this request, in the meet and confer process, Defendants made it clear that the
18 objection was based on relevance by arguing that Defendants did pass on these charges to the
19 installers. In this context they argue that the documents contained personal information of their
20 client Comcast and other proprietary information. See Wang Supp. Decl., Exh. 1. First, these
21 documents are relevant because they establish the existence of the Defendants' policy requiring
22 installers to keep schedules at the cost of their meal breaks. Furthermore, Defendants may not
23 refuse to produce these documents without explaining exactly what "personal and proprietary
24 information" is at stake. Nor Defendants have explained why and how this request would cause
25 any undue burden.

1
2 **III. CONCLUSION**

3 For the reasons stated above, Defendants should be ordered to produce RFP Nos. 1, 2, 6, 7,
4 and 8.

5
6 Dated: June 17, 2008

By: /s/ Adam Wang
Adam Wang